

Larry A. Hammond, 004049
Anne M. Chapman, 025965
OSBORN MALEDON, P.A.
2929 N. Central Avenue, 21st Floor
Phoenix, Arizona 85012-2793
(602) 640-9000
lhammond@omlaw.com
achapman@omlaw.com

John M. Sears
107 North Cortez Street
Suite 104
Prescott, Arizona 86301
(928) 778-5208
John.Sears@azbar.org

Attorneys for Defendant

SUPERIOR COURT
YAVAPAI COUNTY, ARIZONA

2009 OCT 23 PM 2:13

CLERK
By: *N. Seguir*

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA

Plaintiff,

vs.

STEVEN CARROLL DEMOCKER,

Defendant.

) No. P1300CR20081339

) Division 6

) **DEFENDANT'S MOTION TO
RECONSIDER MOTIONS TO
PRECLUDE MR. ECHOLS'
TESTIMONY AND LIMIT DR.
KEEN'S TESTIMONY TO
MATTERS PREVIOUSLY
DISCLOSED**

) **(Expedited Ruling Requested)**

Pursuant to Rules 5, 13.5, 15, and 16 of the Arizona Rules of Criminal Procedure, due process, and the Arizona and U.S. Constitutions, Defendant Steven DeMocker hereby requests that this Court reconsider its rulings on Defendant's oral motions to preclude the testimony of Mr. Echols and to limit the future testimony of Dr. Keen to matters previously disclosed, and to strike those portions of his testimony in which he testified to matters not previously disclosed to the Defendant. Mr. DeMocker submits the following Memorandum in support thereof.

1
2 **MEMORANDUM OF POINTS AND AUTHORITIES**

3 **BACKGROUND**

4 On September 22, 2009 this Court set an evidentiary hearing and oral argument
5 in the nature a *Chronis* hearing for October 20, 2009. The Court also set a deadline for
6 disclosure for the *Chronis* hearing on October 2, 2009.

7 On September 29, 2009, the State provided Mr. DeMocker with a report from
8 Mr. Echols. (Bates 10600, attached as Exhibit 1). On the same date, defense counsel
9 were provided with one paragraph on a blank page, with no identification of the author
10 or agency, purporting to be a summary report of a conversation with Dr. Keen and
11 alleging that an audiotape of the conversation was not properly recorded. (Bates
12 10599). This report was re-disclosed on October 5, 2009 as a supplemental report from
13 Detective McDermott. (Bates 10629). On October 19, 2009, counsel filed a Bench
14 Memorandum regarding Expert Reports requesting the exclusion of Mr. Echols' report
15 and demanding live testimony from Dr. Keen based on the Confrontation Clause of the
16 Sixth Amendment. Later in the day on October 19, 2009, the State advised that it would
17 be calling Mr. Echols and Dr. Keen to testify at the *Chronis* hearing the next day. At
18 the hearing, defense counsel made oral motions asking the Court to prohibit Mr. Echols'
19 testimony and limit Dr. Keen's testimony to opinions previously disclosed to the
20 defense. The Court denied those motions.

21 **ARGUMENT**

22 As noted in Defendant's Bench Memo, the Arizona Supreme Court held that
23 Arizona Rule of Criminal Procedure 5 applies to a hearing to consider whether probable
24 cause exists as to statutory aggravators. *Chronis v. Steinle*, 220 Ariz. 559, 562, 208
25 P.3d 210, 213. Probable cause must be based on "substantial evidence" which may
26 include hearsay in the form of "written reports of expert witnesses." Ariz. R. Crim. P.
27 5.4 (c)(1). Rule 702, Arizona Rules of Evidence, provides that an expert may testify
28

1 about a matter of “scientific, technical or other specialized knowledge” that will assist
2 the trier of fact to understand the evidence or to determine a fact in issue. Ariz. R. Ev.
3 702. “The Rules of Evidence, and Rule 702 itself, erect barriers to admission of all
4 opinion evidence: the evidence must be relevant, the witness must be qualified, and the
5 evidence must be the kind that will assist the jury.” *Logerquist v. McVey*, 196 Ariz. 470,
6 489, ¶ 57, 1 P.3d 113, 132 (2000).

7 **1. This Court Should Exclude Mr. Echols’ Testimony.**

8 Mr. Echols should be prohibited from testifying about matters which are not
9 based on scientific, technical or other specialized knowledge. Although Mr. Echols is
10 purported to be an expert on financial documents and financial fraud, he cites to no
11 financial records, amounts or inaccuracies. Nor does he offer any conclusions about
12 financial impropriety. Instead, as the Court can see from the attached report, Mr. Echols
13 offers opinions – not about financial matters – but rather, about Mr. DeMocker’s
14 behavior, about Mr. DeMocker’s “understandings” of matters in the divorce
15 proceedings, about Carol Kennedy’s feelings, and about the nature and quality of the
16 relationship between Mr. DeMocker and Ms. Kennedy. These opinions are not based
17 on scientific, technical or other specialized knowledge.

18 Furthermore, even if Mr. Echols’ opinions about matters not related to financial
19 issues were the kind of information that might assist a trier of fact as required by Rule
20 702, Mr. Echols is not qualified to offer them. To qualify to testify as an expert witness,
21 the witness must possess expertise that is applicable to the subject about which he
22 intends to testify, and he must have training or experience that qualifies him to render
23 opinions, which will be useful to the trier of fact. *Webb v. Omni Block, Inc.*, 216 Ariz.
24 349, 166 P.3d 140 (Ariz. App. 2007). The party offering expert testimony must show
25 that the witness is competent to give an expert opinion on the precise issue about which
26 he is asked to testify. *Gaston v. Hunter*, 121 Ariz. 33, 51, 588 P.2d 236, 344 (Ariz. App.
27 1978). Mr. Echols’ opinions about these matters are not within the scope of his

1 expertise as a CPA and fraud examiner. Advice to the trier of fact on how to decide the
2 case was not legitimized by Rule 704, and is not admissible under Rule 702.

3 Mr. Echols' report and his anticipated testimony should be precluded as failing to
4 qualify as proper expert opinion under Rule 702 and a common sense understanding of
5 the role of experts.

6 **2. This Court Should Limit Dr. Keen's Testimony to Matters Disclosed to**
7 **the Defense.**

8 The Court set a disclosure deadline for the State under Arizona Rules of Criminal
9 Procedure 15.1 of June 22, 2009. The Court set an additional deadline for disclosure for
10 matters relevant to the *Chronis* hearing on October 2, 2009. Rule 15.1(b) requires
11 disclosure of the results of physical examinations and of scientific tests, experiments or
12 comparisons of experts. Rule 15.1(i)(3) requires that no later than 30 days after filing a
13 notice to seek death penalty, the State shall provide to the defendant the names and
14 addresses of all experts who will support each aggravating circumstance and any written
15 or recorded statements of the expert and all material or information that might mitigate
16 or negate the finding of an aggravating circumstance. Ariz. R. Crim. P 15.1(i)(3)(b) and
17 (d).¹ The court can enlarge the time for this disclosure "only upon a showing of good
18 cause by the prosecution, or upon stipulation of counsel and approval of the court." *Id.*
19 at (4) (emphasis added). Under Rule 15.7, a court "shall" order disclosure and "shall
20 impose any sanction it finds appropriate" unless the error is harmless or the information
21 could not have been previously disclosed. Ariz. R. Crim. P. 15.7(a)

22 Dr. Phillip Keen performed an autopsy on Ms. Kennedy on July 3, 2008. He
23 ruled Ms. Kennedy's death a homicide resulting from "multiple blunt force
24 craniocerebral injuries." (Bates 552-561). The autopsy report offers no opinion as to the
25 order of infliction of the blunt force injuries. It also notes that there are two "patterned
26 contusions whose location and appearance are consistent with defensive injuries." This

27 ¹ The last aggravating factor was noticed on June 29, 2009, well outside the time permitted by Rule 15.1. This is
28 the subject of other filed motions.

1 report was first disclosed in November of 2008. The three pages of diagrams from
2 Keen's report were disclosed on April 27, 2009. (Bates 3646-3648). No other
3 disclosure from Dr. Keen has been provided to the defense.

4 On September 29, 2009, defense counsel were provided with one paragraph on a
5 blank page, with no identification of the author or agency, purporting to be a summary
6 report of a conversation with Dr. Keen and alleging that an audiotape of the
7 conversation was not properly recorded. (Bates 10599). This report was re-disclosed
8 on October 5, 2009 as a supplemental report from Detective McDermott. (Bates
9 10629). The report states that Detective McDermott was directed on September 16,
10 2009 to speak to Dr. Keen regarding the (f)(6) aggravator.² The report further states
11 that Detective McDermott then spoke with Dr. Keen on September 21, 2009 who
12 advised that "the violence was gratuitous and had elements of torture." According to
13 McDermott, Keen then went on to opine, without explanation, that defensive wounds
14 "showed she was aware, alert, and conscious of the attack and felt the pain in at least the
15 early stage of the attack." Keen also alleged, according to McDermott, that this was a
16 clubbing death that was "excessive."

17 These new opinions are not found in Dr. Keen's autopsy report nor are they
18 substantiated by any of the documents disclosed to the defense from Dr. Keen. In fact,
19 this information is inconsistent with Dr. Keen's autopsy report and findings, wherein he
20 notes only two injuries consistent with defensive wounds and makes no reference to
21 torture. The autopsy report does not identify in what order any injuries were inflicted,
22 nor does it allege when or based on what injury Ms. Kennedy was rendered
23 unconscious. Dr. Keen's testimony on October 20, 2009 referred to his opinions based
24 on the physical examination he performed, as referred to under Rule 15.1(4). He
25 performed the autopsy on July 3, 2009. These opinions have never been disclosed to

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27 ² Note that this aggravating factor was noticed on June 29, 2009, long after the time frame for notification under
28 Ariz. R. Crim. P. 15.1, but nonetheless almost three months before the State sought the opinion of Keen, and with
the only evidence at the time it was noticed being two injuries consistent with defensive wounds.

1 the defense. No reason has been given to justify the State's failure to provide this
2 disclosure in accordance with the Court's orders and Rule 15.1. Furthermore, Mr.
3 DeMocker is prejudiced by his inability to prepare for and defend himself in the
4 *Chronis* hearings and at trial.

5 As a result, this Court should limit Dr. Keen's testimony to those opinions
6 previously disclosed to the defense. This sanction is specifically contemplated by Rule
7 15.7(a)(1). Further, the Court should strike Dr. Keen's testimony from October 20 to
8 the extent it touches upon matters not previously disclosed. Finally, the Court should
9 prohibit Dr. Keen from testifying about work done in this case by Dr. Laura Fulginitti, a
10 forensic anthropologist. On October 20, the State attempted to introduce the expert
11 opinion of Dr. Fulginetti through Dr. Keen. This is a violation of Mr. DeMocker's right
12 to confront the testimony of Dr. Fulginetti. Furthermore, there is no traditional hearsay
13 exception or indicia of reliability for one expert to offer the opinions of another expert.
14 In fact, this is precisely the concern the Confrontation Clause was crafted to address.

15 The Confrontation Clause guarantees that "[i]n all criminal prosecutions, the
16 accused shall enjoy the right to . be confronted with the witnesses against him." U.S.
17 Const. Amend. VI . Although hearsay may be admissible at a Rule 5 hearing in certain
18 circumstances, Mr. DeMocker does have a Sixth and Fourteenth Amendment
19 confrontation right. The Confrontation Clause "ensure[s] that testimony of an out-of-
20 court declarant may be given only where it is invested with 'particularized guarantees of
21 trustworthiness.' " *State v. Bass*, 198 Ariz. 571, 580, ¶ 35, 12 P.3d 796, 805 (2000)
22 (quoting *Ohio v. Roberts*, 448 U.S. 56, 66, 100 S.Ct. 2531 (1980)). "The central concern
23 of the Confrontation Clause is to ensure the reliability of the evidence against a criminal
24 defendant by subjecting it to rigorous testing in the context of an adversary proceeding
25 before the trier of fact." *Maryland v. Craig*, 497 U.S. 836, 845, 110 S.Ct. 3157(1990).
26 Arizona courts have implicitly held that the Confrontation Clause applies to a
27 preliminary hearing in admitting transcripts of preliminary hearing testimony at trial
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1 where a witness was unavailable. *See State v. Reynolds*, 7 Ariz. App. 48, 436 P.2d 142
2 (1968). The U. S. Supreme Court has recognized that the Confrontation Clause serves
3 an important purpose that is often most apparent in cases involved "forensic reports."
4 *Melendez-Diaz v. Massachusetts*, 557 U. S. ___ (2009) (No. 07-591). In the absence of
5 an opportunity to confront and cross-examine the people who author reports like Dr.
6 Fulginetti's in this case, significant error and material miscommunication is almost
7 certain to occur. We would be concerned if the prosecutor simply wanted now to throw
8 in her report, but to suggest that another "expert" witness can purport to interpret her
9 words in support of an effort to show that death-warranting aggravators exist, seems a
10 perfect assurance of error that will prove fundamental to Mr. DeMocker's rights.

11 CONCLUSION

12 The work of Mr. Echols and the new opinions of Dr. Keen should be seen for
13 what—transparently—they are. Both are the result of obvious efforts by the State to
14 dream up support for death penalty aggravators. Those aggravators were asserted
15 without a basis in any evidence known at the time. Now, the Arizona disclosure rules
16 and the requirements arising from the Arizona Supreme Court's opinion in *Chronis*
17 have combined to place the State in a jam. Searching for after-the-fact support for
18 imagined aggravators, this is what they came up with. It would not be too uncivil to call
19 this a tawdry salvage job—an effort to shore up a death penalty accusation that has no
20 foundation. The State will only survive this scramble if it can persuade this Court to
21 ignore the fundamental rules designed to guide criminal cases.

22 For these reasons, Mr. DeMocker requests that this Court preclude the expert
23 report of Mr. Echols and limit Dr. Keen's opinions to matters within his personal
24 knowledge previously disclosed to the defense.
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27
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1 DATED this 23rd day of October, 2009.

2
3 By:


John M. Sears

107 North Cortez Street, Suite 104
Prescott, Arizona 86301

OSBORN MALEDON, P.A.

Larry A. Hammond

Anne M. Chapman

2929 N. Central Avenue, Suite 2100
Phoenix, Arizona 85012-2793

Attorneys for Defendant

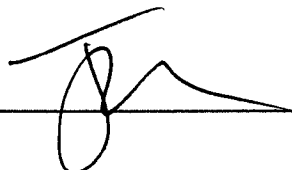
10
11 **ORIGINAL** of the foregoing filed
this 23rd day of October, 2009, with:

12 Jeanne Hicks
13 Clerk of the Court
14 Yavapai County Superior Court
120 S. Cortez
Prescott, AZ 86303

15 **COPIES** of the foregoing hand delivered
16 this 23rd day of October, 2009, to:

17 The Hon. Thomas B. Lindberg
18 Judge of the Superior Court
Division Six
120 S. Cortez
Prescott, AZ 86303

19
20 Joseph Butner, Esq.
21 Office of the Yavapai County Attorney
Prescott courthouse drawer

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